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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 110

WILLIAM MALLOY, *Petitioner*

vs.

PATRICK J. HOGAN, Sheriff of Hartford County, *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT

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INDEX

	Page
Citations and Authorities	ii
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory provisions	1
Question Presented	2
Statement of Case	3
Summary of Argument	6
Argument	7
Conclusion	25
Appendix	A-1

CITATIONS AND AUTHORITIES

Abbate v. United States, 359 U.S. 187 (1959) 15, 16

Adamson v. California, 332 U.S. 46 (1947) 7, 8, 14, 15

Anonymous v. Baker, 360 U.S. 287 (1959) 12

Bartkus v. Illinois, 359 U.S. 121 (1959) 16

Blackburn v. Alabama, 361 U.S. 199 (1960) 10

Bram v. United States, 168 U.S. 532 (1897) 8, 10

Brown v. Mississippi, 297 U.S. 278 (1936) 9

Cohen v. Hurley, 366 U.S. 117 (1961) 6, 8

Culombe v. Connecticut, 367 U.S. 568 (1961) 12

Elkins v. United States, 364 U.S. 206 (1960) 15

Emspak v. United States, 349 U.S. 190 (1955) 23

Haynes v. Washington, 373 U.S. 503 (1963) 10

Heike v. United States, 227 U.S. 131 (1913) 19

Hoffman v. United States, 341 U.S. 479 (1951) 17, 22, 25

In re Groban, 352 U.S. 330 (1957) 12

In re Pillo, 11 N.J. 8; 93 A. 2d 176 (1952) 23

Isaacs v. United States, 256 F. 2d 654 (8th Cir. 1958) 20

Ker. v. California, 374 U.S. 23 (1963) 14

Knapp v. Schweitzer, 357 U.S. 371 (1958) 9

Maffie v. United States, 209 F. 2d 225 (1st Cir. 1954) 20

Mapp. v. Ohio, 367 U.S. 643 (1961) 9, 13, 14

Mason v. United States, 244 U.S. 362 (1917) 19, 24

Olmstead v. United States, 277 U.S. 438 (1928) 17

Rogers v. Richmond, 365 U.S. 534 (1961) 9, 10, 11

Screws v. United States, 325 U.S. 91 (1945) 15

Shotwell Manfacturing Co. v. United States, 371 U.S. 341 (1963) 8, 10

Snyder v. Massachusetts, 291 U.S. 97 (1934) 7

Temple v. Commonwealth, 75 Va. 892 (1881) 18

Twining v. New Jersey, 211 U.S. 78 (1908) 7, 8, 13

United States v. Coffey, 198 F. 2d 438 (3d Cir. 1962) 19, 23

United States v. Doto, 205 F. 2d 416 (2d Cir. 1953) 19

United States v. Gernie, 252 F. 2d 664 (2d Cir. 1958) 18

United States v. Kahriger, 345 U.S. 22 (1953) 16

United States v. Romero, 249 F. 2d 371 (2d Cir. 1957) 18

Weeks v. United States, 232 U.S. 383 (1914) 13

Williams v. United States, 341 U.S. 97 (1951) 9

Wolf v. Colorado, 338 U.S. 25 (1949) 13, 15

AUTHORITIES

8 Wigmore, Evidence (3rd ed. 1940) 10

8 Wigmore, Evidence (McNaughton ed. 1961) 8, 11, 13, 18

3 Wigmore, Evidence (3rd ed. 1940) 8

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Errors is reported at 150 Conn. 520; 187 A. 2d 744, and appears in Transcript Of Record, p. 26 ff.

JURISDICTION

The Judgment of the Supreme Court of Errors of Connecticut was entered on January 3, 1963. The petition for a writ of certiorari was filed April 19, 1963, and certiorari was granted June 3, 1963. The Jurisdiction of this Court rests on 28 U.S.C., Sec. 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth and Fourteenth Amendments to the Constitution of the United States, *infra*, Appendix, p. A-1.

Sec. 9 of Article First to the Constitution of the State of Connecticut, *infra*, Appendix, A-1.

Connecticut General Statutes, Revision of 1958, *infra*:

Sec. 1-1	Appendix, p. A-2
Sec. 51-35	Appendix, p. A-2
Sec. 52-199	Appendix, p. A-2
Sec. 52-470	Appendix, p. A-2
Sec. 53-295	Appendix, p. A-3
Sec. 54-47	Appendix, p. A-4
Sec. 54-193	Appendix, p. A-5
Sec. 54-197	Appendix, p. A-6

Model Code of Evidence (Rule 203) Appendix, p. A-7
Uniform Rules of Evidence (Rule 25) Appendix, p. A-7

QUESTION PRESENTED

Whether the Fourteenth Amendment to the Constitution of the United States was violated by the State of Connecticut in ordering a witness to answer questions relating to gambling activities for which he had already been convicted and upon which the statute of limitations barred further prosecution, the claim of privilege having been made without any explanation whatsoever?

The numerical references prefaced by letter "R" refer to the page of Transcript Of Record. All statutory references are to Connecticut General Statutes, Revision of 1958. Appendix references are prefaced by letter "A."

STATEMENT OF CASE

On September 11, 1959, the Petitioner and two others with him in the same apartment were arrested in a gambling raid at 600 Asylum Street, Hartford, Connecticut. He was charged with two counts of pool-selling, in violation of Sec. 53-295 of the General Statutes, a misdemeanor.

Subsequently, on November 5, 1959, he was found guilty on the first count of the information. He was ordered to pay a fine of $500, and was sentenced to one year in jail, execution of the jail sentence to be suspended after 90 days of service and thereafter to be on probation for two years. Immediately after sentencing a nolle prosequi to the second count of the information was entered. (R, 17, 27)

Sometime afterwards the Superior Court in Hartford County, pursuant to Sec. 54-47 of the General Statutes, entitled, "Investigations into Commission of Crime," appointed the Honorable Ernest A. Inglis, formerly Chief Justice of Connecticut and then a state referee, to conduct, in private, an inquiry into whether there was reasonable cause to believe that crimes, including gambling, had been committed in Hartford County. Witnesses were subpoenaed to appear before the referee and on January 16, 1961, the Petitioner Malloy, who had been so subpoenaed, appeared and was asked certain questions by the State's Attorney. (R, 27)

Malloy refused to answer all questions put to him on that date, except for giving his name and address, (R, 7, 8) on the ground that an answer would tend to incriminate him.

The State's Attorney then indicated that the matter would have to be referred to the Superior Court for contempt proceedings under the authority of Sec. 54-47. The referee suggested to Malloy that he consult a lawyer before he was summoned for contempt. (R, 8, 27) Contempt proceedings were not then instituted and nine days later, on January 25, 1961, Malloy was recalled as a witness and again questioned. During the nine-day interval Malloy had full opportunity to and he did consult counsel.

The questions asked him on January 25, which he again refused to answer on the same claim of privilege, were practically identical with those he had been asked on his first appearance before the referee. (R, 7-10, 17-20)

The next day, on complaint of the State's Attorney, Malloy was brought before the Superior Court and, after a hearing, was adjudged in contempt for having failed to answer proper questions. He was ordered committed to jail until he answered the questions or until the further order of the court. Later that same day he made application for a writ of habeas corpus directed to the Respondent as the keeper of the jail. He claimed his confinement in jail was illegal because it was based on a denial of his constitutional privilege to refuse to answer questions on the ground of self-incrimination, in violation of the Fifth Amendment to the Constitution of the United States and of Sec. 9 of Article First to the Constitution of Connecticut. (R, 28)

A second hearing on the same issues was held on February 7, 1961, this being on the habeas corpus writ. The court found the issues for the Respondent and that Malloy was not unlawfully confined, and it dismissed the writ. From that judgment Malloy appealed to the Supreme Court of Errors of Connecticut, his claim of error being that his refusal to answer the questions was privileged. (R, 28)

Malloy was released on bond after the habeas corpus writ was dismissed. During all of these proceedings and at the time he was released on bond he was on probation from his conviction of November 5, 1959. (R, 12, 17)

Malloy did not introduce any evidence and he did not make any attempt before the referee or at either of the court hearings to suggest to the referee or the court how an answer to the questions could incriminate him. (R, 22, 31, 32, 34, 35)

The questions put to Malloy on January 16 and January 25 (R, 17-20) are summarized substantially as follows:

(1) For whom did Malloy work on September 11, 1959, the date he was arrested on the charge for which he was convicted?

(2) Who selected and paid his counsel in connection with that charge and his defense thereto?

(3) Who selected his bondsman and who paid him?

(4) Who paid Malloy's fine?

(5) What was the name of the tenant in the apartment in which he was apprehended?

(6) Did he know John Bergoti? (R, 28)

The Supreme Court of Errors held that since it did not appear that the Petitioner had reasonable ground to apprehend danger of incrimination, since the claim of privilege was made without any explanation, since the questions pertained to matters for which he had already been convicted, and since prosecution for the criminal activity in which the Petitioner had engaged was effectively barred by the statute

of limitations, there was no error by the trial court in ordering him to testify. (R, 30-35)

SUMMARY OF ARGUMENT

Although this Court has several times indicated that the States are wholly free to compel a witness to incriminate himself, and as recently as 1961 said there was no federal constitutional right not to be required to incriminate one's self in state proceedings, *Cohen v. Hurley*, 366 U.S. 117, 127-8, Respondent is unable to reconcile such statements with recent decisions excluding involuntary confessions from state criminal trials. Respondent therefore concedes that such dicta should be qualified and that the accusatorial system is a fundamental concept in our society, guaranteed in state proceedings by the Fourteenth Amendment.

Respondent's principal argument for affirmance is that the decision below did not violate the fundamental principles of the accusatorial system embodied in the concept of "Due Process," but was a reasonable and just accommodation of the duty of a citizen to respond to orderly inquiry and his countervailing right to refrain from convicting himself through his own mouth.

There is, and will continue to be, substantial differences of opinion among the States as to the proper allocation of the burden of establishing the validity of a claim that answers will incriminate. There is no talismanic test. Nor does the text of the Fourteenth Amendment, its history, or its policy provide a ready answer.

Imposing identical standards upon both Federal and State Courts would be a misguided mistake, unsupportable in reason or policy, destructive of the basic values of federalism and, in the end, a disservice to the cause of individual liberty.

Finally, Respondent contends that even if the identical standards developed in cases arising under the Fifth Amendment are applied to the facts of this case, the decision below, given the latitude that the trial judge deserves, was a correct application of those standards, inasmuch as the Petitioner has at no time provided the courts with a basis upon which reasonably to infer that answers to the questions would endanger him.

ARGUMENT

1. The Fifth Amendment's privilege against self incrimination, *in all its particularities and peripheral characteristics*, does not apply to the States through the Due Process Clause of the Fourteenth Amendment.

In *Twining v. New Jersey*, 211 U.S. 78, the Court held that it was not a violation of the Fourteenth Amendment for the State to permit the jury to draw unfavorable inferences from the failure of the defendant to testify. Holding that the privilege against self incrimination was not "a fundamental principle of liberty and justice which inheres in the very idea of free government" (*id.* at 106) but merely "wise and beneficient rule of evidence" (*ibid.*), the Court concluded that the right was "not secured by any part of the Federal Constitution." (*id.* at 114)

In 1947 the Court reaffirmed the *Twining* decision by a 5-4 vote in *Adamson v. California*, 332 U.S. 46. There the precise issue was the constitutionality of comment by the State on the failure of the accused to take the stand. Both decisions, therefore, involved peripheral aspects of the privilege, even though the approach taken by the Court in those cases tends to support the *dictum* that the "privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state" *Snyder v. Massachu-*

setts, 291 U.S. 97; *Adamson v. California, supra*, at 52. Yet no state has ever given the Court occasion to decide such a case, for all States have guarded the privilege since their inception, 48 of them expressing it in their constitutions. See 8 Wigmore, *Evidence* §2252 (McNaughton ed. 1961); *Twining v. New Jersey, supra.*

As recently as 1961, however, the *Twining* and *Adamson* decisions were cited by the Court as authority for the proposition that there is no federal constitutional right not to be required to incriminate one's self in State proceedings. *Cohen v. Hurley, supra*, 127-8. Respondent believes such broad *dicta* should be qualified and that the *Twining* and *Adamson* cases should be interpreted in their context as involving only penumbral characteristics of the privilege. The broad, sweeping statements made in such cases have been undermined by the recent decisions of this Court excluding coerced confessions from state criminal trials. The latter decisions cannot be squared with the notion that the States are wholly free to compel self incrimination.

The Court has recognized in federal cases that the doctrinal basis for excluding coerced confessions from federal trials is the Fifth Amendment's ban against compulsory self-incrimination, *Bram v. United States*, 168 U.S. 532; *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341, and the right to refrain from incriminating one's self involuntarily also underlies the Court's decisions excluding coerced confessions from state trials.

Although Wigmore argues that confessions are not rejected because of any connection with the privilege against self incrimination and that the two principles should be kept "distinctly apart," his argument is historical and does not reflect the trend of decisions in this Court. See 3 Wigmore, *Evidence* §823 (3d ed. 1940). Wigmore contends that con-

fessions historically were rejected only if untrustworthy. *ibid.* It is doubtless an independent ground for excluding a confession under the Due Process Clause that the confession is unreliable, for a trial in which such a confession is used is an unfair trial, not calculated to produce the truth. As the Court noted in *Brown v. Mississippi*, 297 U.S. 278, a "trial is .... a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence."

But trustworthiness is no longer the test under the Due Process Clause. Assuring a conviction upon reliable evidence is not the only criterion by which confessions are tested. Due Process is denied, regardless of trustworthiness, whenever the confession was obtained by "methods . . . (which) offend an underlying principle in the enforcement of the criminal law; that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers v. Richmond*, 365 U.S. 534, 540-1. This is precisely the principle behind the privilege against self incrimination. See *Knapp v. Schweitzer*, 357 U.S. 371: "The sole—although deeply valuable—purpose of the Fifth Amendment privilege against self incrimination is the security of the individual against exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth."

It may be argued that the conduct of the police in coercing a confession does not itself violate the Constitution, but that merely the use of such a confession at the trial so transcends the boundaries of fairness as to "shock the conscience" of the Court. See *Mapp v. Ohio*, 367 U.S. 643, 684-5 (dissenting opinion); but *cf. Williams v. United States*, 341 U.S. 97. Yet the use of torture, starvation, threats of vio-

lence, and other conduct which "shocks the conscience" is not a *sine qua non* for excluding a confession from a trial; the sole test is "voluntariness." See *Rogers v. Richmond, supra; Blackburn v. Alabama,* 361 U.S. 199; *Haynes v. Washington,* 373 U.S. 503. The Court in going beyond the "conscience shocking" test and employing the exclusion device in an effort to preserve the principle of the accusatorial system against the temptations of the police to convert it into an inquisitorial system, has implicitly applied the core of the privilege against self incrimination to the States.

The argument made by Wigmore and others (see 8 Wigmore, *Evidence* §2252 (3rd ed., 1940)) that the privilege against self incrimination applies only to proceedings in which compulsory testimony is *legally authorized*, and not to evidence compelled by the police, is a product of his view that confessions are inadmissible only when untrustworthy. This distinction has not been applied by the Court, see *Bram v. United States, supra, Shotwell Manfuacturing Co. v. United States, supra,* and is rejected in the Model Code of Evidence (Rule 203) and the Uniform Rules of Evidence (Rule 25), both of which apply the privilege to inquiries by any "public official" of the state. (App. p. A-7)

Moreover, the distinction between legally authorized inquiries and lawless inquiries makes little sense, except in the realm of metaphysics.

The argument has been stated thusly:

> Since police have no legal right to compel answers, there is no legal obligation to which a privilege in the technical sense can apply. That is, it makes no sense to say that one is privileged not to disclose — that one is excused from the legal consequences of contumacy — when there are no legal consequences of contumacy.

8 Wigmore, *Evidence* §2252, n. 27 (McNaughton ed. 1961).

Yet in excluding the fruits of evidence compelled by the police, this Court has recognized a right to be silent and, by excluding the confessions obtained in violation of this right, has used the only meaningful sanction available. Moreover, whether the police were "authorized" to compel the accused to answer has never been considered determinative in coerced confession cases.

Such distinctions have little place in Constitutional issues. The Court, in determining the permissible limits of police interrogation of an accused under the Due Process Clause, is not merely attempting to assure that the procedures employed to compel testimony are authorized by state law. If so, the states could avoid the fundamental principles reflected in such cases as *Rogers v. Richmond, supra,* merely by authorizing the police to force the prisoner to confess.

If the State were free to compel the accused to take the stand in the trial of his own case, and in fact attempted to do so, what rational foundation would remain for holding unconstitutional the coercion of a confession in the jail house, not by brutality or other conduct offensive to civilized standards of decency, but merely by holding the accused incommunicado until he confessed? What is the difference between a judge *putting* a witness in jail as a means of forcing him to confess, and a policeman *keeping* him in jail until he confesses?

Underlying the decisions excluding coerced confessions is the implicit assumption that an accused is privileged against incriminating himself, either in the jail house, the grand jury room, or on the witness stand in a public trial. The principal motivation for incommunicado coercion by the police

is the effort to circumvent the suspect's right of silence which will be available to him in the formal proceedings. *cf. Culombe v. Connecticut*, 367 U.S. 568, 571. The principal reason for excluding confessions coerced by the police is to preserve the right of silence available in later proceedings.

Even if an accused could be compelled to testify against himself in a trial, there would still be some motive for attempting to pry a confession from him before he had counsel. The coerced confession cases, therefore, also tend to preserve the right to counsel. Yet no federal right to have counsel present at all official interrogations has been recognized by the Court. See *In re Groban*, 352 U.S. 330; *Anonymous v. Baker*, 360 U.S. 287. So it is not merely protection of the right to counsel that is involved, but preservation of the right of silence. It is fundamentally inconsistent to suggest, as the Court's opinions now suggest, that the State is entirely free to compel an accused to incriminate himself before a grand jury, or at the trial, but cannot do so in the police station. Frank recognition of the fact that the Due Process Clause prohibits the States from enforcing their laws by compelling the accused to confess, regardless of where such compulsion occurs, would not only clarify the principles involved in confession cases, but would assist the States significantly in their efforts to comply with the limitations placed upon them by the Fourteenth Amendment.

To suggest that the Fourteenth Amendment precludes the States from compelling an accused to confess, and that the basic principle of the accusatorial system embodied in the Fifth Amendment also applies to the States, does not require the conclusion that all the procedural characteristics developed in federal cases should be applied as well to the States. It is one thing to conclude that the accusatorial system has become a fundamental part of the fabric of our society and, hence, is enforceable against the States, and quite another to

say that the States should be given no room to differ in their interpretations of the periphery of this basic principle in its application to concrete investigatory problems. Reasonable, fair-minded men have disagreed over the precise policy to be served by the privilege as well as its application and its desirability in specific circumstances, even though the privilege has been recognized as a fundamental right by all of our fifty states without deviation. See generally, 8 Wigmore, *Evidence* §2251 (McNaughton ed. 1961). It is no less true today than it was fifty-five years ago, that "the difficulties of ascertaining [the] connotation [of the privilege] have been increased in American jurisprudence, where it has been . . . put to new uses as a limit on legislative power." *Twining v. New Jersey, supra,* 100.

Respondent does not agree with Petitioner that the Court's decision in *Mapp v. Ohio, supra,* logically requires that the self incrimination clause of the Fifth Amendment, together with all its procedural accouterments, should be read into the Fourteenth.

While the Court in *Mapp* noted the intimate relationship of the Fourth and Fifth Amendments (see 367 U.S. at 646-7, 656-7), the decision was based upon the guarantees of the Fourth Amendment. *Id.* at 655.

The issue in the *Mapp* case was whether the exclusionary rule of *Weeks v. United States,* 232 U.S. 383, held applicable only to federal courts in *Wolf v. Colorado,* 338 U.S. 25, should be applied to the States through the Due Process Clause. The Court having decided in *Wolf,* in 1949, that the "core" of the Fourth Amendment's protection against unreasonable searches and seizures was "implicit in the concept of ordered liberty" and therefore a requisite of Due Process, the only question decided by *Mapp* was that the "exclusionary rule is an essential ingredient of the Fourth Amendment

as the right it embodies is vouchsafed against the States by the Due Process Clause." *Mapp v. Ohio, supra,* at 651.

In deciding the basic question that the "security of one's privacy against arbitrary intrusion by the police" was guaranteed by the Fourteenth Amendment, the Court in *Wolf* found no inconsistency with *Adamson v. California, supra,* rendered only two years before. It can hardly be argued now, fourteen years after *Wolf*, that the principle of that case, vitalized by Mapp's exclusionary rule, is logically at odds with the *Adamson* decision.

Respondent is unable to argue, however, that the basic principle of the accusatorial system, at the core of the Fifth Amendment privilege, is any the less valuable or basic to a free society than the principles at the foot of the Fourth Amendment. What Respondent does deny is Petitioner's apparent suggestion that all the procedural aspects of the Fifth Amendment privilege are as basic and fundamental as the principle itself and should therefore be incorporated wholesale into the Fourteenth Amendment.

Insofar as recent decisions may be read as incorporating all the criteria of the Fourth Amendment into the Fourteenth, See *Ker v. California,* 374 U.S. 23, Respondent contends that the policies and procedural problems involved in searches and seizures of one's person or effects are far different from the complex configurations of the Fifth Amendment. Limitations on searches and seizures touch only a minor avenue of criminal investigation; the prohibition against self incrimination pervades them all — indeed, it is potentially present in all legal proceedings, civil, criminal, and administrative.

Moreover, the *Mapp* and *Ker* cases, broadening the scope of the Fourteenth Amendment as it applies to searches and

seizures, were merely accretions upon earlier decisions, chiefly *Wolf v. Colorado, supra* and *Elkins v. United States*, 364 U.S. 206. The *Mapp* and *Ker* decisions were reached only after a lengthy period during which the States were given an opportunity to adjust to the *Wolf* doctrine, to experiment with their own remedies for unreasonable searches and seizures, to assess the results, and to have them assessed by this Court. Only when those remedies have been found wanting and, presumably, when it became apparent to the Court that further steps would not seriously disrupt State criminal law administration, did the Court finally apply the same criteria to both States and Federal Government.

No single decision in the area of searches and seizures represented so abrupt and substantial a departure from the past as would the one which Petitioner nows asks the Court to make.

Potent policies counsel against shackling the States with all the penumbral characteristics and procedural properties of the Fifth Amendment privilege — policies in the service of both effective law enforcement and individual liberty.

"This Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement," *Elkins v. United States, supra,* 222, but in fashioning the standards governing claims under the Fifth Amendment, the investigative and enforcement problems at stake have been those of the Federal Government. The practical demands of the States are not comparable.

The primary responsibility for investigating, prosecuting, and preventing common criminality rests, in a federal system, upon the States. See *Abbate v. United States*, 359 U.S. 187, 195; *Screws v. United States*, 325 U.S. 91, 109. The interest of the Federal Government in investigating crime is

often ancillary to its primary functions and supplementary to the functions of the States. When the Federal Government is thwarted in an investigatory inquiry, the result is often merely to leave the problem where it primarily belongs, in the bosoms of the States. Only when both the States and the Federal Government are thwarted does law enforcement tend to crumble.

Moreover, a particular line of inquiry by the Federal Government is seldom crucial; it often is in the States. The Federal Government has the most proficient police force in the world, aided by an intricate, worldwide network of facilities for gathering, classifying, and transmitting information to assist it in ferreting out and prosecuting crime. Its subpoena and arrest powers are nationwide; its resources virtually unlimited.

Imposing identical limitations on the investigative powers of both States and Federal Government is like asking a giant and a dwarf to carry identical loads. It will ineluctably lead to more federal grand juries, more F.B.I. wiretaps, more Congressional Crime Committees, and more federal legislation designed to supplement the criminal law of the States; for if the States cannot cope with local crime, they will seek the superior advantages of the Federal Government. The threat to liberty lurking in federal excrescences upon state law has been noted often by members of this Court. See, *e.g.*, *United States v. Kahriger*, 345 U.S. 22; *Bartkus v. Illinois*, 359 U.S. 121; *Abbate v. United States*, *supra*. A decision which encourages this trend is at most a muffled blow for liberty.

Moreover, an essential value of federalism is imperilled when State and Federal standards are made from the same mold. As Mr. Justice Brandeis eloquently noted, "Our Government is the potent, the omnipresent teacher. For good

or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (dissenting opinion). The Federal Government is the omnipresent teacher for the States; it should be an experimental laboratory wherein the highest standards of criminal procedure are tried, tested, and held out for the States to follow. A single standard for both will necessarily attenuate the capacity of the Federal system for growth and leadership. When the federal standard limits not only the government whose concern with local crime is at most ancillary to its primary functions, but also the governments who bear the main burden — with resources minuscule in comparison — risk must be eschewed, flexibility sacrificed, experiments curtailed. A standard which can carry with it the burden of both systems of criminal law enforcement — federal and state — can only be a lower standard, a standard of stone, held in place by a calcified community consensus.

2. The decision below was a reasonable accommodation of the right of a witness not to convict himself out of his own mouth and the duty of a citizen to respond to orderly inquiry in matters of legitimate and substantial importance to the state. *Furthermore*, the decision below was consistent with the standards adopted for Federal Courts in *Hoffman v. United States*, 341 U.S. 479.

A. *Hoffman v. United States* is readily distinguishable.

Petitioner apparently seeks to bring this case under the shelter of the facts in *Hoffman*. Yet there has never been any contention by the Respondent that the questions asked Petitioner were wholly unrelated to any criminal activities in which Petitioner might have been engaged. Respondent would readily concede that had the Petitioner, at the time he was questioned, been *still subject to prosecution* for his pool selling offenses, he would be entitled — under State law — to refuse to answer questions regarding the name and identity

of his employer and the owner of the dwelling in which he had been taking bets. But such is not the case.

The criminality of Petitioner's conduct, to which the questions related, had been expurgated, both by his conviction and by the statute of limitations. That conviction expurgates criminality "is universally conceded." 8 Wigmore, *Evidence* §2279 (McNaughton ed. 1961). See also *United States v. Gernie*, 252 F.2d 664, 669-70 (2d Cir.); *United States v. Romero*, 249 F. 2d 371 (2d Cir.) Moreover, even if the witness has not been convicted, but the statute of limitations bars conviction, liability to punishment ceases and, with it, the privilege. See 8 Wigmore, *supra*, §2279.

B. There is nothing in the record, in the setting of the case, or in Petitioner's brief to support the inference that answers to the questions asked might reasonably tend to incriminate him.

Petitioner's suggestion that appearance of a "mere possibility" of incrimination is adequate to sustain the privilege is erroneous and has never been applied by any court. The Court in *Hoffman* did quote from *Temple v. Commonwealth*, 75 Va. 892, 898 to the effect that it was not "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer cannot possibly have [a] tendency to incriminate." See *Hoffman v. United States*, *supra*, at 488. But in the setting of the *Hoffman* case it should be perfectly clear that the standard applied by the Court was less absolute than a literal reading of the naked words, torn from their context, might suggest. For the Court also said that, "The witness is not exonerated from answering merely because he declares that in doing so he would incriminate himself — his say-so does not of itself establish the hazards of incrimination. It is for the court to say whether his silence is justified."

Unless the Court did not mean what it said in *Hoffman*, but intended the witness' say-so to be final, then there must be some affirmative appearance of danger before a witness is privileged from testifying.

The Court in *Hoffman* also said that the privilege is "confined to instances where the witness has reasonable cause to apprehend danger from a direct answer," citing *Mason v. United States*, 244 U.S. 362, 365 wherein the Court reiterated the century-old principle that the privilege does not extend to "remote possibilities out of the ordinary course of law." See also *Heike v. United States*, 227 U.S. 131, 144.

Manifestly, there was a greater showing of danger to the witness in *Hoffman v. United States*, than there is in this case. Moreover, in all of the cases cited by petitioner there were facts known to the trial judge which gave credence to the witness' claim and justified the inference that answers might assist the Government in prosecuting the witness for a criminal offense.

In *United States v. Doto*, 205 Fed. 2d 416 (2d Cir.), the witness was Joe Adonis who refused to tell the Kefauver Committee whether or not he had made any political contributions. The witness had a singular reputation as a racketeer, which had been buttressed by an earlier report of the committee billing him as "an underworld character" and head of a "major crime syndicate." The alleged object of the Committee's investigation was to uncover a tie-up between organized crime and public officials. The Court held the connection of the question to a number of federal crimes, including bribery, conspiracy, and mail fraud was clear. No remote possibilities were involved.

In *United States v. Coffey*, 198 F.2d 438 (3rd Cir.), the court upheld a witness' refusal to tell a federal grand jury

whether certain individuals were engaged in the numbers business. Since an answer to the question, affirmative or negative, would reveal the witness' own connection with illegal activity, the court properly upheld the claim.

In *Isaacs v. United States*, 256 F.2d 654 (8th Cir.), a grand jury was investigating possible criminal income tax evasion by unknown persons who received cash payments of $99,000 from a corporation of which the witness was president. The investigation was precipitated when the witness' son refused to disclose to a revenue agent the identity of the recipients because they "had not reported it as gross income" on their federal income tax returns. Called before the grand jury, the president, who had signed some of the checks made out to "cash," refused to disclose who received the money. Holding that an answer might reveal that the witness himself received some of the money, or that it might tend to prove that the witness conspired with the recipients to evade the income tax laws, the court upheld the privilege.

In *Maffie v. United States*, 209 F.2d 225 (1st Cir.), the witness refused to answer questions relating to his acquaintanceship with certain individuals reputed to be underworld characters and some of whom were suspected in the Brink's robbery. The witness himself had been investigated by the F.B.I. and four persons who had been questioned by the F.B.I. about him testified at the contempt hearing that they had informed the witness of the F.B.I. inquiries. The court held that the witness "had reasonable ground to fear that he was suspected . . . of being implicated somehow in the criminal transaction, and that he was being summoned before the grand jury in the hope that some incriminating disclosures could be extracted from him." *Id.* at 232.*

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* It is worthy of note that in three of the four cases above, *Doto, Coffey*, and *Maffie*, as well as in the *Hoffman* case itself, the federal investiga-

Great latitude should doubtless be given to a witness where it appears to the court that the witness can reasonably assume, as in *Maffie, supra* that he is a suspect and that the interrogator is trying to build a case against him. In such circumstances, even an otherwise apparently innocuous question might be used as a link in the prosecutor's chain. But where there is absolutely no evidence that the questions are being asked to construct a case against the witness, and where the setting of the inquiry suggests to the contrary, surely some showing must be made to convert an innocuous question into an incriminating one.

Petitioner suggests that the "approach" of the court below was "most unsophisticated" in failing to recognize the possibility that Petitioner may have committed a felony during his bet-taking activities. (Petitioner's Brief, p. 14) Yet not even in this Court is Petitioner able to suggest what that felony might be. If, like the witness in *Hoffman*, Petitioner had a twenty-year police record, had been listed as a "known gangster" and publically labelled as an "underworld character" and racketeer, perhaps it would not be unreasonable to ask the trial judge to speculate about the possibility that Petitioner may have committed a felony. No such facts exist. As far as appears from the record, Petitioner was simply an employee of an unknown gambling syndicate; and inasmuch as Petitioner asks the court to make several assumptions, "it might not be amiss to assume" (Petitioner's Brief, p. 14) that Petitioner, in receiving only a ninety-day jail term for his crime, was not considered a professional gangster.

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tory bodies were engaged in an activity designed to assist States in enforcement of essentially local crimes. The decisions, insofar as they may have thwarted the Federal Government in its efforts, nevertheless left the States free to pursue their own investigations. See Respondent's argument, *supra*, pp. 15-17.

Petitioner argues that surely "an experienced State's Attorney did not ask frivolous or harmless questions," (Petitioner's Brief, p. 14), implying that the questions were designed to trap Petitioner back into the jailhouse. Such an assumption is wholly unwarranted. It must appear fairly obvious that the State's Attorney was attempting to get information regarding the employers of Petitioner for the purpose of prosecuting them.

There is in this case no evidence to suggest that Petitioner ever committed any other crime than the one for which he was convicted. Nor is there any evidence to indicate that Petitioner feared, or had reason to fear, prosecution for any other crime. As the Court below was at pains to point out, even if the court indulged in the speculation that Petitioner participated in a conspiracy, there is no suggestion that the conspiracy would be for anything other than pool selling. Thus, the conspiracy would be barred by the statute of limitations. General Statutes, Sec. 54-197.

Petitioner does not complain that the state failed to bear its burden of proof that the statute of limitations expired. He did not suggest below, nor does he suggest here, that the statute of limitations was tolled by reason of a pending prosecution or Petitioner's absence from the state. Respondent submits that independent proof that the statute has not been tolled is required of the State only when the issue is raised and relied upon by Petitioner in the trial Court. Raising the issue could not itself incriminate Petitioner. There is, therefore, no reason why he should not be required to join issue on the point.

As this Court said in *Hoffman v. United States, supra* at 486:

> ". . . if the witness, upon interposing his claim, were required to prove the hazard in the sense in which

> a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

Respondent submits that this test was not met by Petitioner. Neither before the Referee (R, 7-10) nor at the contempt hearing (R, 10-12) did Petitioner or his counsel offer any explanation whatever of the grounds upon which the claim of privilege was based. There was at that time no apparent reason why an explanation would itself constitute an incriminatory disclosure and no such reason has yet been suggested. Surely no claim of privilege is sustainable when there is neither explanation of the basis of claim nor argument advanced as to why even an explanation might be injurious. See *In re Pillo*, 11 N.J. 8, 21, 93 A.2d. 176.

In *United States v. Coffey, supra,* which Petitioner cites as "following the spirit of the *Hoffman* case," (Brief for Petitioner, p. 13) and which this Court quoted with apparent approval in *Emspak v. United States,* 349 U.S. 190, 198, n. 18, the Court said:

> "(To sustain the privilege) It is enough (1) that the trial court be shown *by argument* how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime against the United States, and (2) that this

> suggested course and scheme of linkage not seem incredible in the circumstances of the particular case. It is in this latter connection, the credibility of the suggested connecting chain, that the reputation and known history of the witness may be significant." (emphasis supplied)

No such argument or suggested linkage was made to the trial court. None was made to the Court below. None is made here.

The Court below *applied* federal standards and found the claim of privilege unwarranted. Thus, even if the Fourteenth Amendment is held to apply the full force of the Fifth Amendment's privilege against self incrimination to the States, the decision of the Supreme Court of Errors of the State of Connecticut should be affirmed.

If, as the Court said in *Hoffman*, "(t)he trial judge in appraising the claim must be governed as much by the peculiarities of the case as by the facts in evidence," *supra* at 487, then the trial judge's decision ought not to be upset unless patently wrong. As the Court noted in *Mason v. United States, supra* at 366, the trial judge,

> ". . is in (a) much better position to appreciate the essential facts than an appellate court . . . and he must be permitted to exercise some discretion, fructified by common sense, when dealing with this necessarily difficult subject. Unless there has been a distinct denial of a right guaranteed, we ought not to interfere."

The advantage of the state trial judge in appraising the claim of self incrimination is even greater than that of the

federal trial judge. Involving as it does a claim of incrimination under the laws of the state, only a state judge is likely to be familiar with the range of laws under which the claim might be made to fit. The Court will be accepting an impossible burden if it attempts to impose federal standards upon the States without at the same time granting substantial deference to the decisions of state courts in the concrete applications of those standards.

CONCLUSION

The decision below was consistent with the standards laid down by this Court in *Hoffman v. United States, supra.* There was no evidence, no colorable claim, no argument, which could support the conclusion that answers to the questions asked would incriminate the Petitioner. There was nothing more than a bare assertion, incredible in the circumstances. Thus, even if federal standards were applicable to the States through the Fourteenth Amendment, the decision below would be correct.

But decisions of State Courts in self incrimination cases should not be judged by the identical standards employed by this Court in supervising claims arising under the Fifth Amendment in federal courts. The proper standard under the Due Process Clause is whether the State has departed from the fundamental priciples of the accusatorial system — whether the decision was a reasonable accommodation of the witness' duty to respond to an orderly inquiry and his right to refrain from convicting himself through his own mouth. Since there was no evidence that Petitiner was suspected of a crime for which he had not already been convicted, nor evidence that the State was seeking to snare him

by asking incriminating questions, a remote possibility that an answer might possibly be admissible evidence in a wholly speculative criminal prosecution does not give the Petitioner a constitutional right to refuse to testify in a matter of substantial importance to the State.

The decision of the Supreme Court of Errors of the State of Connecticut should be affirmed.

Respectfully submitted,

Respondent,

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APPENDIX

Fifth Amendment to Constitution of the United States

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to Constitution of the United States

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sec. 9 of Article First to Constitution of Connecticut

"In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to demand the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his favor; and in all prosecutions by indictment or information, a speedy, public trial by an impartial jury. He shall not be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by due course of law. And no person shall be holden to answer for any crime, the punishment of which may be death or imprison-

ment for life, unless on a presentment or an indictment of a grand jury; except in the land or naval forces, or in the militia when in actual service in time of war, or public danger."

Connecticut General Statutes, Revision of 1958, *Sec.* 1-1

"Any crime punishable by death or imprisonment for more than one year shall be deemed a felony, and any other crime, unless designated a felony by statute, shall be deemed a misdemeanor."

Connecticut General Statutes, Revision of 1958, *Sec.* 51-35

"Any court may commit to jail any person legally summoned who refuses to appear and testify before it in any case, there to remain at his own expense until he so testifies; but no person shall be compelled to give evidence against himself, except as otherwise provided by statute, nor shall such evidence when given by him be used against him."

Connecticut General Statutes, Revision of 1958, *Sec.* 52-199

"In the conduct of any hearing or trial, a party interrogated shall not be obliged to answer a question or produce a document the answering or producing of which would tend to incriminate him or to disclose his title to any property the title whereof is not material to the hearing or trial in the course of which he is interrogated, and the right to refuse to answer a question, produce a document or disclose a title may be claimed either by the party interrogated or by counsel in his behalf."

Connecticut General Statutes, Revision of 1958, *Sec.* 52-470

"The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments therein, and inquire fully into the cause of imprisonment, and shall

thereupon dispose of the case as law and justice require. No appeal from the judgment rendered in a habeas corpus proceeding brought in order to obtain his release by or in behalf of one who has been convicted of crime shall be taken unless the judge before whom the case was tried or a justice of the supreme court of errors, within ten days after the case is decided, certifies that a question is involved in the decision which ought to be reviewed by the supreme court of errors."

Connecticut General Statutes, Revision of 1958, *Sec.* 53-295

"Any person, whether as principal, agent or servant, who owns, possesses, keeps, manages, maintains or occupies, or assists in keeping, managing, maintaining or occupying, any building, room, office, park, ground, enclosure or place with apparatus, books or boards or any device for the purpose of making, recording or registering bets or wagers, or of buying or selling pools, upon the result of any trial on contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of any game, competition, political nomination, appointment or election, whether such trial, contest, game competition, nomination, appointment or election takes place either within or without this state, or where pool selling of any kind, either directly or indirectly, is permitted or carried on, or in which the business of transmitting money to any race track or other place there to be placed or bet on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, is permitted or carried on in any manner, and any person who keeps a place which is reputed to be a place resorted to for the purpose of selling pools upon the result of any election, and any person who makes, records or registers any such wagers or bets, or buys or sells, or is concerned in buying or selling, any such pools, or in carying on the business of the trans-

mission of money to any race track or other place there to be bet or placed on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, and any person who, being the owner, lessee or occupant of any building, room, park, ground, enclosure, or place, or part thereof, knowingly permits the same to be used or occupied for any such purpose, shall be fined not more than five hundred dollars or be imprisoned not more than one year or be both fined and imprisoned; and each day of such owning, keeping, occupying, permitting or transmitting shall constitute a separate offense. Any person who becomes the custodian or depositary of any pools, money, property or thing of value, in any manner wagered or bet upon such result, or of any apparatus of any kind used for the purpose of assisting in buying or selling any such pools or making any such wagers or bets, shall be punished in like manner. The provisions of this section shall not prohibit the giving of purses or premiums for any trial or contest of skill, speed or endurance of man, beast, bird or machine and the charging of an admission or entrance fee to any contestant in any such trial or contest."

Connecticut General Statutes, Revision of 1958, *Sec.* 54-47

Whenever it appears to the superior court for any county that the administration of justice requires an investigation to determine whether or not there is probable cause to believe that a crime or crimes have been committed within the county, said court may order an inquiry to be made into the matter, to be conducted before any judge of said court or a state referee designated by it. Such inquiry shall be conducted in public or private as said court orders. The attendance of witnesses and the production of documents at such inquiry may be compelled by subpoena, signed by any official authorized to issue such process. If any witness properly summoned fails to appear or to produce any documents

included in such subpoena, or if he fails to answer any proper question, the judge or referee conducting such inquiry may report the matter to the state's attorney for the county wherein the investigation is being conducted and such state's attorney may file a complaint setting forth the facts at any criminal session of the superior court in such county. The court shall thereupon issue a citation to such witness to appear before said court and show cause why he should not be punished as for a contempt, and if, after hearing, the court finds that he failed to appear without due cause or failed to produce any document properly to be presented to the judge or state referee conducting the investigation or failed to answer any proper question in the course of such investigation, it may punish him as it might a witness failing to appear, to produce a document properly to be considered or to answer a proper question before the court. Witnesses may be examined by the judge or state referee conducting the inquiry or by the state's attorney or by any other attorney or attorneys appointed by the court for such purpose. The official stenographer of said court or his assistant shall record any testimony so taken. At the conclusion of such inquiry the judge or referee conducting the same shall file with the court a report and the court shall direct whether, and to what extent, such report shall be made available to the public or interested parties. Any transcript of testimony taken at such inquiry shall likewise be filed with the court and it shall have the same powers with reference to it as it has with reference to the report; provided any person accused of crime as a result of such inquiry shall have access at all reasonable times to the transcript of his own testimony given by him in such inquiry."

Connecticut General Statutes, Revision of 1958, *Sec.* 54-193

"No person shall be prosecuted for treason against this state, or for any crime or misdemeanor of which the pun-

ishment is or may be imprisonment in the State Prison, except within five years next after the offense has been committed; nor shall any person be prosecuted for the violation of any penal law, or for other crime or misdemeanor, except crimes punishable by death or imprisonment in the State Prison, but within one year next after the offense has been committed; but, if the person, against whom an indictment, information or complaint for any of said offenses is brought, has fled from and resided out of this state, during the period so limited, it may be brought against him at any time, within such period, during which he resides in this state, after the commission of the offense; and, when any suit, indictment, information or complaint for any crime may be brought within any other time than is limited by this section, it shall be brought within such time."

Connecticut General Statutes, Revision of 1958, *Sec.* 54-197

"Any person who combines, confederates or agrees with another or others to accomplish any unlawful object by lawful means, or any lawful object by unlawful means, or any unlawful object by unlawful means, if one or more of such persons do any act in furtherance of such combine, confederation or agreement, shall be fined not more than five thousand dollars or imprisoned not more than fifteen years or both, provided, if the crime which is the object of such combination, confederation or agreement is a misdemeanor, such person shall be subject to the same penalty as is provided by statute for the commission of the misdemeanor. No officer or member of any lawful organization shall be held liable for the unlawful acts of individual officers, members or agents of such organization expect upon proof of participation in or authorization of such acts or of the ratification thereof."

Model Code of Evidence (*Rule* 203)

SELF-INCRIMINATION: GENERAL

Subject to Rules 201, 205 to 208, and 231, every natural person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this State or any governmental agency or division thereof any matter that will incriminate him.

Uniform Rule of Evidence (*Rule* 25) — (1942)

SELF-INCRIMINATION: EXCEPTIONS

Subject to Rules 23 (privilege of accused) and 37 (waiver by contract or prior disclosure), every person has a privilege, which he may claim, to refuse to disclose in an action or to a public official of this state or any governmental agency or division thereof any matter that will incriminate him . . .